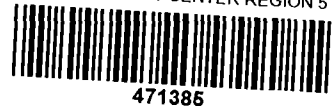


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US EPA RECORDS CENTER REGION 5



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April 26, 1990

HAND DELIVERED

Ms. Beth Henning
Assistant Regional Counsel
U.S. EPA - Region V
230 South Dearborn Street
Chicago, Illinois 60604

Re: Albion-Sheridan Township Landfill,
Calhoun County, Michigan

Dear Ms. Henning:

On March 19, 1990, the United States Environmental Protection Agency ("U.S. EPA") issued an unilateral Administrative Order to Harvard Industries, Albion Division, pursuant to Section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Under the Order, U. S. EPA alleges that Hayes-Albion Corporation, n/k/a Harvard Industries, Albion Division ("Harvard Industries"), is either a "past owner or operator" of the Albion-Sheridan Township Landfill ("Site") located in Albion, Michigan, or "arranged for disposal or transport for disposal" of hazardous substances at the Site. The Order requires Harvard Industries to participate in the removal of all "surface wastes and their respective containers," identify and sample all containers of hazardous substances, conduct air monitoring, create a safety and health plan, and limited site fencing. As demonstrated below, however, Harvard Industries possesses a reasonably objective belief that sufficient cause exists for its non-compliance with the Order. This office represents Harvard Industries and all further notices regarding this site should be directed to this office.

Harvard Industries maintains a reasonably objective belief that U. S. EPA's Section 106 Order is inapplicable because Harvard Industries does not qualify as one of the four following classes of potentially responsible parties provided

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for in Section 107(a) of CERCLA. Clearly, Harvard Industries has neither owned or operated the Site, nor has it transported hazardous waste to the Site. Therefore, Sections 107(a)(1), (2) and (4) of CERCLA do not provide potential liability to Harvard Industries. Further, as indicated in its answers to Questions 7 and 8 of U.S. EPA's Section 104(e) Information Request of September 23, 1988, Harvard Industries has never arranged for the disposal of hazardous waste at the Site. Thus, "generator" liability is not properly founded under Section 107(a)(3) of CERCLA, as well.

In order to establish liability under Section 107(a)(3), there must be a showing by U.S. EPA that a "person" within the meaning of CERCLA arranged for disposal, or transportation for disposal, of hazardous substances under his ownership, possession or control. United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 810 F.2d 726, 743-744 (8th Cir. 1986). According to the U.S. Court of Appeals: "It is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme." Id. at 743.

During the April 23, 1990 informal conference attended by yourself and five other U.S. EPA representatives, it was stated that Harvard Industries was named in the 106 Order because of U.S. EPA's belief that the Company was connected to the surface wastes. Mr. El-Zein clarified that it was the Agency's position each 106 Order recipient sent paint or solvent wastes, as in the surface drums, to the site.

You produced all liability records, not in the administrative record, linking Harvard Industries to the site. The only document that even mentioned Hayes-Albion was Mr. B. O'Neal's telephone note dated May 5, 1988 from a conversation with Mr. A. Wilkinson. That note does not indicate Hayes-Albion sent drummed hazardous waste, but only "garbage and wastes".

Section 107(a)(3) is the standard liability provision imposed upon generators whose waste is disposed of at a facility from which there is a release of that hazardous substance. Harvard Industries is not the generator of the ignitable waste located in drums on the surface of the Site and has not substantially contributed to the release of hazardous

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substances at the Site. Indeed, the Hayes-Albion plant never sent drummed waste or hazardous waste to the Site or even generated paint and solvent wastes.

A prior communication with the late Mr. Stevick, the owner and operator of the Site, revealed that the drums of liquid ignitable waste came to be located on the surface of the Site by virtue of unauthorized disposal -- "midnight dumping" -- after the Site had been closed. (See Affidavit of Keith Konnie attached.)

There is further reason to believe the drums necessitating the removal action were dumped on the site after it closed in 1981. First is a Michigan Department of Natural Resource's ("MDNR") memorandum dated May 6, 1985 by Ron Koonstra to Andy Hogarth. In this memo, MDNR determined it would not spend allocated Act 307 funds to fence the site because there was no evidence of a direct contact threat. MDNR has indicated that surface drums containing wastes would normally have been noted and resulted in finding a threat of direct contact. Therefore, it must be assumed no such drums existed in 1985. Furthermore, on November 8, 1988 Harvard Industries' employee Allan Currie inspected the site after receiving a 104e request. At that time, there were only eight (8) drums onsite. (See Affidavit of Allan B. Currie attached.) There are now twenty-seven (27) drums onsite, eleven (11) of which are empty according to Mr. El-Zein who acknowledged that the site is still used today for illegal surface disposal. Harvard Industries, therefore, has a Section 107(b)(3) defense to the Unilateral Order as this was an act of a third party with no contractual relationship.

Indeed, Harvard Industries has not engaged in any kind of unauthorized disposal at the Site, nor has it ever sent drums of liquid waste to the Site. (See Affidavit of Gene Collins of December 2, 1988.) For that matter, the refuse that Harvard Industries disposed of at the Site consisted entirely of solid waste, i.e., office trash, wooden pallets, and cardboard boxes. (See Affidavit of Don Hull of November 29, 1988). Harvard Industries is not a liable party for the disposal of drums of liquid ignitable waste at the Site. Harvard Industries has never shipped any liquid, container, barrel (empty or full), or any other hazardous substance to the Site for disposal.

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Under the Order the recipients are directed to sample, clean and dispose of two underground gasoline tanks, one aboveground tank, and two container boxes. The Order is improperly issued with respect to Harvard Industries as the work is divisible and not related to the company's alleged waste stream. The gas tanks are connected to dispensers and there is no evidence they contained waste. There is no evidence Harvard Industries sent liquid waste that could have been placed in the aboveground tank. The empty container boxes do not pose an imminent and substantial endangerment. Also, the fencing is unnecessary once the 16 drums of material are over packed. The fencing and gates are truly remedial action activity and should not be subject to this Order.

As described, Harvard Industries never generated, owned or possessed, or arranged for disposal, or transportation for disposal, of the liquid ignitable waste that is the subject of U.S. EPA's Section 106 Order. Accordingly, Harvard Industries believes that "sufficient cause" exists for not complying with the requirements of U.S. EPA's Section 106 Order. Harvard Industries therefore requests that U.S. EPA remove its Hayes-Albion division from the list of potentially responsible parties at the Albion-Sheridan Township Landfill and withdraw the Order as to it.

If you have any further questions or comments, please contact me or my associate Grant Gilezan (313-568-6789). This letter shall become a part of the administrative record.

Very truly yours,

DYKEMA GOSSETT

A handwritten signature in cursive script, reading "James G. Fausone" followed by a date "4/29/90".

James G. Fausone
(313) 568-6957

JGF/jmc
5335

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cc: Allan B. Currie
Robert C. Choate
Terry Baker
Grant P. Gilezan
Eugene Smary
Michael Ortega
Thomas Shannon